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IN THE

SUPREME COURT OF THE UNITED STATES

No. ...1272

MAE CALDWELL, Individually and on Behalf of Her Minor Son, CHARLES CALDWELL, and All Others Similarly Situated,
Petitioners,

vs.

DONALD CRAIGHEAD, as Band Instructor at Lebanon High School; ERWIN REED, as Superintendent of Schools for Wilson County, Tennessee; BARRY SUTTON, as Principal of Lebanon High School; THE BOARD OF EDUCATION OF WILSON COUNTY, TENNESSEE; KENNETH HACKNEY, DAVE SMITH, DENVER BATES, PAT BRYANT, CLAUD JENNINGS, T. M. DOBSON and CARL JOHNSON, All Members of the Board of Education of Wilson County, Tennessee; And All Other Public School Band Instructors, Superintendents of Schools, Public High Principals, and Boards of Education and Their Members, in the State of Tennessee, Jointly and Severally, Who Are Similarly Situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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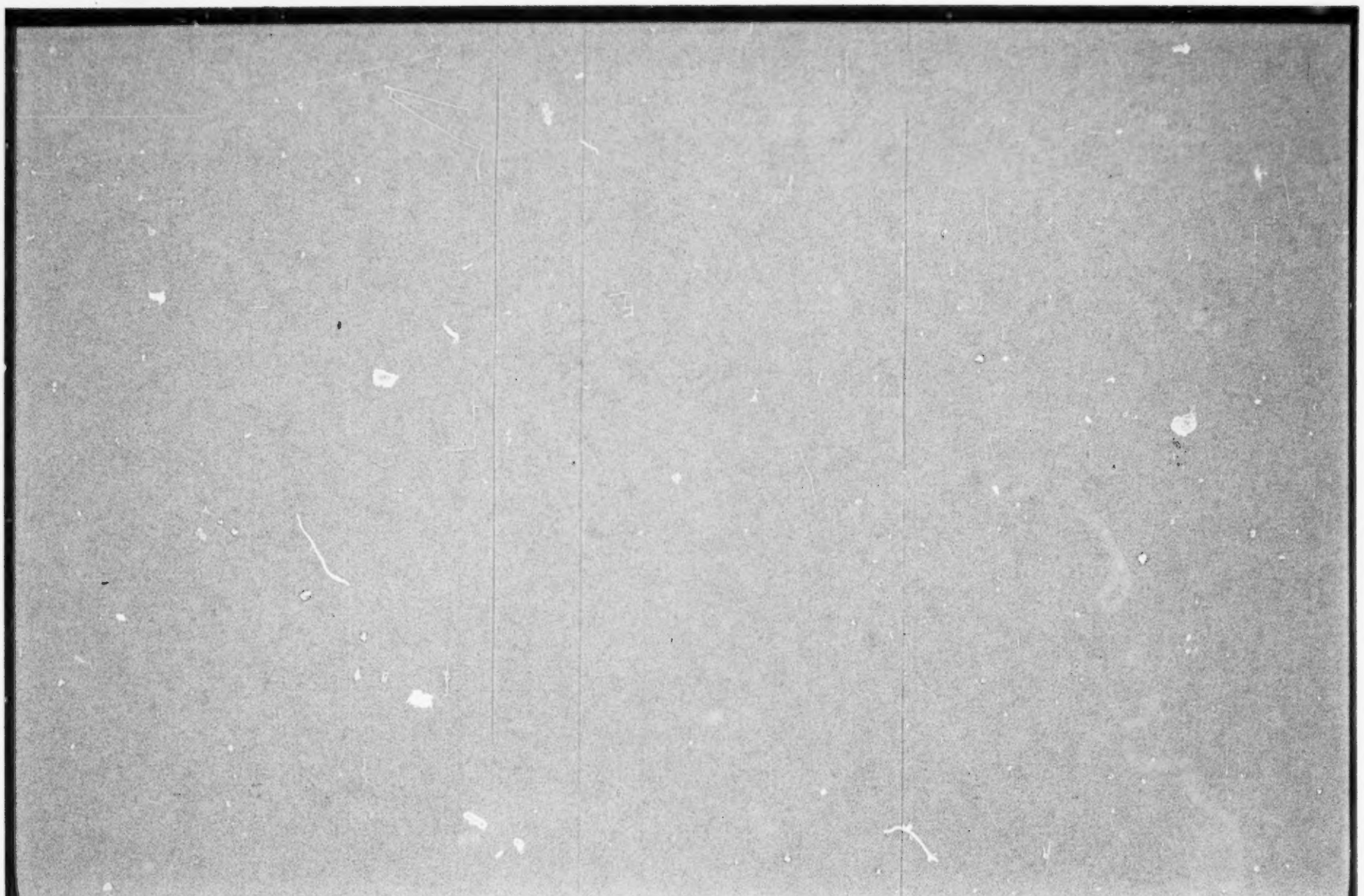

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
Argument	7
I. The Decision Below Is Correct	7
A. The Class Action	7
B. The Mootness Issue	10
C. Mrs. Caldwell's Case	13
II. There Is No Important Question of Federal Law	16
Conclusion	17

TABLE OF AUTHORITIES

Cases

Gray v. Sanders, 372 U.S. 368 (1963) 11

Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966) 13

Moore v. Ogilvie, 394 U.S. 814 (1969) 11

Oil Workers Local 8-6 v. Missouri, 361 U.S. 363 (1960) 10

Pickering v. Board of Education of Township High School District 205, 391 U.S. 563 (1968) 14, 15

Stromberg v. California, 283 U.S. 359 (1931) 15

United States v. W. T. Grant Company, 345 U.S. 629 (1953) 10

Zenith Radio Corporation v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 13

Rules

Federal Rules of Civil Procedure, Rule 23 16

Federal Rules of Civil Procedure, Rule 52(a) 13

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memoranda and orders of the District Court are unreported and are set forth at pages 23a through 32a of the Appendix to the Petition for Certiorari. The opinion of the Court of Appeals for the Sixth Circuit and the dissenting opinion are reported at 432 F. 2d 213 and are copied as pages 1a through 22a of the Appendix to the Petition for Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether, as found by the Court of Appeals, the rights petitioners are allegedly attempting to enforce in this action are individual rights arising out of a unique fact situation so as to make this an improper case for class action.

2. Whether a suit involving dismissal from high school band activities becomes moot because during the appeal the named plaintiffs move to another community served by a different school system.

3. Whether the trial court and Court of Appeals correctly determined that petitioner's dismissal from the position of teacher's aide was not a retaliatory act of racial discrimination but rather that petitioner's discharge was because of her failure to perform adequately at her job.

STATEMENT

Petitioners instituted this action on March 5, 1969 in the Federal District Court for the Middle District of Tennessee. Petitioner Charles Caldwell was at that time a student at the Lebanon (Tennessee) High School and sued to require his readmission to the Lebanon High School Band and to enjoin the defendants from requiring him to play "Dixie" or similar songs in the future. Petitioner contends his suspension from the Band was due to his failure to play "Dixie" while performing with the pep band at a pep rally on January 3, 1969.

Petitioner Mrs. Mae Caldwell is the mother of Charles Caldwell and was employed at the Lebanon High School

until her employment was terminated on January 31, 1969. Mrs. Caldwell sued to be restored to her position and to be awarded back pay for the time after she was discharged on the grounds that her dismissal was a retaliatory act of racial discrimination.

On March 26, 1969 petitioners amended their complaint to object to certain voluntary exercises at the High School which petitioners contended were impermissible as religious.

After a hearing and submission of briefs, the trial judge on May 7, 1969 entered a Memorandum in which he found, as matters of fact, that Charles Caldwell was not required to play the song "Dixie" in order to continue his musical education as a member of the Lebanon High School Band and that he was not dismissed from the Band for his refusal to play "Dixie" but rather was dismissed for walking out of a performance in direct violation of a disciplinary regulation (Appendix—37a). The court further found that the evidence was insufficient to support Mrs. Caldwell's allegations as to the basis of her dismissal (Appendix—39a-40a).

On July 11, 1969 the Court entered an order which held the petitioners to lack standing to assert their objections to the allegedly religious exercises in the school and which sustained respondents' motion for summary judgment (Appendix—47a).

Petitioners originally asked that the action be maintained as a class action and that they be granted declaratory relief (Appendix—3a-4a). Under the trial court's findings of fact, no declaratory relief was appropriate. Similarly, the trial court made no finding as to the appropriateness of a class action. The Court of Appeals, 432 F.2d at 217, determined that the case was not appropriate for class action, either as to the plaintiffs or the defendants.

The factual situation in Charles Caldwell's case is fairly simple. Lebanon High School offers, but does not require, a course in band for which academic credit is given. Students registering for this course are automatically in the marching and concert bands (Appellees' Appendix to Brief in Court of Appeals—Testimony of Craighead). The pep band is an informal voluntary function consisting of band members who wished to participate (Appellees' Appendix to Brief in Court of Appeals—Testimony of Craighead). The band director testified that no rolls were checked for the pep band and that he would not punish a student for not appearing with the pep band (Appellees' Appendix to Brief in Court of Appeals—Testimony of Craighead). Rolls were kept and attendance checked at the marching and concert band functions (Appellees' Appendix to Brief in Court of Appeals—Testimony of Craighead). In October, 1968, the band director had announced a rule that anyone who walked out of a band function would be out of the band. Charles Caldwell admitted that he was aware of the rule and was aware of what the consequences of leaving the pep band performance might be (Appendix—75a). The pep band often played "Dixie" and Charles Caldwell had participated in this during the fall and winter of 1968 (Appendix—58a). Caldwell admitted that no band except the pep band had played "Dixie" that year (Appendix—58a).

On January 3, 1969, when the pep band began to play "Dixie" at a pep rally, Charles Caldwell walked away from the band and out of the auditorium. He was then dismissed from all band activities for the remainder of the school year by the band director. This action was ratified by other school officials including the school board.

The band director testified that he would have excused Charles Caldwell from playing the song if Charles Caldwell had told him he did not want to play "Dixie" because

it was offensive to him personally (Appendix—87a). The director also testified that another band member had objected to playing "Dixie" and had left the informal pep band, but not the band itself, without any sanctions and with the approval of the director (Appendix—87a).

The details in Mrs. Caldwell's case as developed in the record are in some dispute. The basic factual situation is fairly clear however. Mrs. Caldwell was hired during the summer of 1968 to work as a teacher's aide at the Lebanon High School. The defendants' witnesses, including Barry Sutton, principal of the high school, Erwin Reed, Superintendent of Wilson County Schools, and William Hester Gibbs, assistant principal at Lebanon High School, all testified as to complaints they had received or which they had concerning Mrs. Caldwell's performance of her duties or her behavior while at the school. On January 31, 1969, Mrs. Caldwell was notified that her employment was terminated effective immediately. This action was subsequently ratified by other school officials including the school board. Petitioner's trial counsel at the trial explicitly informed the court that no objection was being made to the termination on the grounds of procedure or due process. The sole question was whether she was discharged for improper reasons (Appellees' Appendix to Brief in Court of Appeals—Discussion with Court). As the trial court noted, there was considerable evidence that Mrs. Caldwell was discharged for unsatisfactory performance of her duties but there was no evidence except the timing of her dismissal to support her claim of retaliation (Petitioner's Appendix—p. 28a).

During the hearing there was some discussion of written statements obtained by appellees. Subsequent to the trial appellees filed these statements with the Clerk. There were no further proceedings in open court to which these statements would have been relevant and they were never

admitted into evidence or made a part of the record. There is no indication that they were ever seen by the trial judge.

The issue raised as to the allegedly religious services in the high school dealt with activities during the school year of 1968-1969. The Court of Appeals in dicta noted that anyone attending the school would have standing to object to the activities but ruled that the issue was moot as a result of the petitioner's leaving the school system.

ARGUMENT

Respondent contends that this case is inappropriate for certiorari for two reasons. First, the questions raised by the opinion of the Court of Appeals are not new or important questions of Federal law which are worthy of this Court's time and consideration; and second, even if questions of some importance were presented, this is not an appropriate case for their determination because stripped of all procedural questions which have arisen in the course of the litigation this case is only a factual dispute between two named plaintiffs and one school board.

The factual nature of the dispute in this case is exemplified by the first question presented by the petitioners in their petition for certiorari (page 3). The petitioners assert that the question is whether a black high school student can be dismissed from a school band for refusing to play the song "Dixie." Petitioners have alleged throughout the case that this was the basis for the dismissal of Charles Caldwell from the band. However, the defendants have throughout the case insisted that this was not an issue in the case since Charles Caldwell was dismissed from the band not for refusing to play the song "Dixie" but for violating a rule against walking out of any band performance. The district judge specifically found as matters of fact "that Charles Caldwell was not required to play the song 'Dixie' in order to continue his musical education as a member of the Lebanon High School Band" and "that Charles Caldwell was not dismissed from the Lebanon High School Band for his refusal to play 'Dixie' with the pep band on January 3rd" (Petitioner's Appendix—pp. 26a-27a). This was apparently the basis for the Court of Appeals determination that the action was not properly brought as a class action. As the Court of Appeals pointed out, petitioners here are attempting to enforce "individual rights arising out of a unique fact situation." 432 F2d at 217.

The same factual difficulties appear in petitioner Mrs. Caldwell's case. The petition for certiorari recognizes this by stating as the question presented "whether the finding that a black employee's dismissal was not the result of racial discrimination is supportable." The District Court made a finding of fact that the only objective evidence lending credence to Mrs. Caldwell's claim was the fact that her dismissal did occur 28 days after the "Dixie" incident. The court further found that petitioner Mrs. Caldwell had not proved her dismissal to be a retaliatory act of racial discrimination (Petitioner's Appendix—p. 28a). The Court of Appeals noted that the findings of the trial court on this issue was supported by credible evidence and indicated that Mrs. Caldwell was discharged for her failure to perform adequately her job. 432 F.2d at 219.

Finally, the essentially factual nature of the dispute in this case is emphasized by the questions which are not presented here. It is apparently undisputed that the rule petitioner Charles Caldwell violated was a valid rule, certainly not enunciated for any discriminatory purpose, that petitioner Charles Caldwell was aware of the rule, and aware of its implications upon his act. As the District Court noted, petitioner apparently does not argue that his violation of the rule was a constitutionally protected form of dissent (Petitioner's Appendix—p. 27a). Therefore, the usual constitutional issues are not present and there is a simple factual question of whether or not Charles Caldwell was dismissed from the band for refusing to play "Dixie." As the trial court pointed out, the allegation that he was so dismissed is unsupported in the proof (Petitioner's Appendix—p. 25a). In petitioner Mrs. Caldwell's case there is no claim that her dismissal involved a denial of procedural due process of law (Petitioner's Appendix—p. 28a) and apparently Mrs. Caldwell made no attempt to refute the allegations of incompetence even though provided the opportunity to do so by the school board.

I.

The Decision Below Is Correct.

The Court of Appeals essentially made four decisions as to the relative parts of this case. First, the court decided that this action is not properly brought as a class action. Second, the court decided that petitioner Charles Caldwell's case is moot. Third, the court decided that the District Court should be upheld as to the merits in petitioner Mrs. Charles Caldwell's case. Fourth, the court decided that the issue as to purported religious exercises was moot.

A. The Class Action

The Court of Appeals decision that the class action procedure was not appropriate in this case was based upon the factual nature of the case. If petitioner Charles Caldwell had been required to play "Dixie" and had been dismissed from the band for his refusal to play this song, then this case might well be appropriate for class action treatment. As respondent has consistently contended, as the District Court found, and as the Court of Appeals agreed, petitioner Charles Caldwell never "made out a case for the proposition that his disciplining was the result of racial discrimination." 432 F. 2d at 217. Thus, from the proof in the case as seen by the courts below, petitioner Charles Caldwell is not shown to have any common interest with any other person. If the acts complained of had been racial in nature, then a class action on behalf of persons of his race might have been appropriate. If the rule which petitioner Charles Caldwell violated were under attack, then a class action on behalf of all students at the high school, or at least all band members, might be appropriate. However, in the case at hand, there is simply no evidence to indicate that this is anything other than an unfortunate dispute between a student disciplined for violation of a rule and those responsible for the rule.

B. **The Mootness Issue**

The second question and the fourth question cited by the Court of Appeals went to the mootness of petitioner Charles Caldwell's case and the mootness of the purported religious exercises question. This case was originally heard by the District Court in the spring of 1969 at which time petitioner Charles Caldwell was a tenth grade student in the Lebanon High School. It appears unquestioned that prior to the next school year after that hearing petitioners moved their residence to Nashville, Tennessee which is in a different county and petitioner Charles Caldwell began attending school in a different school system. In view of the lapse of time, there is considerable question whether Charles Caldwell will still even be in high school by the time this case comes to the consideration of the Court.

The factual nature of the dispute between petitioners and respondents reappears as soon as an attempt is made to discuss the applicable cases. Both the petitioners and the respondents and, indeed, the majority and dissenting judges on the Court of Appeals seem to agree as to the case law and standards which are applicable to the case but argue as to the facts which should be tested against them. The leading case in this area is **United States v. W. T. Grant Company**, 345 U.S. 629 (1953), which dealt with the voluntary discontinuance of the alleged illegal conduct by the defendant, where the Court stated that there must exist something beyond the mere possibility of a recurrent violation to avoid a finding of mootness, 345 U.S. at 633. Respondents, contending Charles Caldwell's case to be only an argument about the enforcement of an admittedly valid rule, would argue that this case comes well within the **W. T. Grant** standards for mootness and especially as they were applied in **Oil Workers Local 8-6 v. Missouri**, 361 U.S. 363 (1960). In the **Oil Workers** case

the statute complained of was directly aimed at the type of activities in which the union could reasonably be expected to engage in the future. In line with that opinion, it appears to be much more speculative to urge that the present case should be pursued because some other student in the Lebanon High School might at some time in the future feel he should not be dismissed from the band for walking out of a band performance for whatever reason.

The present case is clearly distinguishable from such recent decisions as **Moore v. Ogilvie,** 394 U.S. 814 (1969), and **Gray v. Sanders,** 372 U.S. 368 (1963). In each of these cases the Court was presented with an election statute the inherent validity of which was questioned and the application of which to subsequent elections was certainly more than speculative. In the present case, the rule against walking out of a band performance is not questioned. Unless one accepts the petitioner's contention that Charles Caldwell was dismissed from the band for failure to play "Dixie", which contention has been denied consistently by the respondents and explicity rejected by the trial court, there is simply no major issue or recurring controversy in that aspect of the case.

As to the fourth question decided by the Court of Appeals, that of the mootness of the religious exercises aspect of the case, it would again appear that there is very little here for this Court to treat. The trial court originally dismissed this aspect of petitioner's case on the ground that they had no standing (Petitioner's Appendix—p. 30a-32a). The Court of Appeals ruled that the trial court was incorrect on this issue and that the plaintiffs would have had standing but ruled the controversy was moot because the petitioners had left the school system involved. 432 F.2d at 220. Apparently, no proof was taken on this issue and from the record it is rather unclear exactly what sort of activities were in-

volved. For an adequate determination of what type of activities were being conducted in the school system in the school year 1968-1969, it would probably be necessary to return the case to the trial court for a fact hearing. Since two full school years will have passed before any such hearing could take place, it is very doubtful whether the activities complained of in 1968-69 are still conducted in the school system at all. It would seem that if any impermissible activities are conducted by the school system then the well publicized opinions of this Court coupled with the Court of Appeals opinion that a student in the school system and its parents would have standing to challenge such activities will provide all of the avenues necessary for adequate judicial supervision. Whether religious activities were conducted by the Wilson County School System in 1968 and 1969 is of only historical interest. If any dispute is to arise as to the program activities of the school system in the school year just ending or in that beginning in September of 1971, it would certainly seem that someone connected with the school system rather than the present petitioners, who admittedly have not been so connected since the summer of 1969, will be the proper persons to conduct that dispute.

Finally, the most obvious argument for the application of the mootness doctrine in this case is the fact that these questions do not appear to have arisen again since the spring of 1969. Petitioner alleges that he was the victim of racial discrimination. Respondents assert that petitioner was merely the victim of his own willful violation of a valid rule and deny that they intend to discriminate on the basis of race or any other impermissible ground against this individual or any other individual. Certainly, if the named respondents in this case were engaged upon a course of racial discrimination, justified complaints would have been heard from other students.

The same would apply to the religious exercises question. If the unlawful activities, if any, were being continued someone would have come forward during the 2 year interval to complain of them.

C. Mrs. Caldwell's Case

The other decision of the Court of Appeals was that the findings of the trial court that Mrs. Caldwell's dismissal was prompted by the fact she performed inadequately as a teacher's aide was supported by credible evidence and was not clearly erroneous. 432 F.2d at 219. The Court of Appeals summarized the evidence as presented to the District Court and applied the "clearly erroneous" standard as provided for in Federal Rules of Civil Procedure 52(a). 432 F.2d at 219. This Court has recently emphasized again this is the proper standard and that the appellate court should not determine whether it would have made the same findings as the trial court but should decide whether on the entire evidence it is left "with the definite and firm conviction that a mistake has been committed". **Zenith Radio Corporation v. Hazeltine Research, Inc.**, 395 U.S. 100, 123 (1969).

Petitioner Mrs. Caldwell apparently does not dispute the school authorities' conclusion that she was sufficiently incompetent at her job and that they considered her dismissal to be justified. Her only complaint is that other, improper factors entered into her dismissal. Since Mrs. Caldwell's incompetence was clear and apparently not disputed, the case of **Johnson v. Branch**, 364 F.2d 177 (4th Cir. 1966), relied upon by petitioner is not in point. That case involved the failure of a school board to renew the contract of a teacher with a fine record over a 12 year period where the only reasons given for this failure were certain very minor infractions. The **Johnson** case does not apply where the incompetence is unquestioned and

only the other possible factors in the dismissal are at issue.

Respondents would emphasize that they have consistently denied that impermissible considerations entered into petitioner's dismissal and respondents further assert that their contention is supported by the record. The principal of the high school, the man who recommended Mrs. Caldwell's dismissal to the superintendent, testified "as far as I know, she was dismissed because her work was not satisfactory" (Appendix—p. 112a). Petitioners' counsel on cross-examination attempted to establish some other grounds for the dismissal but the principal's unequivocal answer set forth above was never qualified. The respondents have insisted throughout this case that the sole ground for dismissal of Mrs. Caldwell was her incompetence at her job. Apparently based upon certain vague remarks made by the superintendent of schools on cross-examination, petitioner attempts to bring the instant case within the ambit of **Pickering v. Board of Education of Township High School District 205**, 391 U.S. 563 (1968). However, the present case is substantially different from the **Pickering** case. **Pickering** dealt with a situation where a teacher published a letter critical of the school board. The "criticism" in the instant case apparently consisted of disapproval of and disagreements with teachers and other administrative personnel (Appendix—91a, 93a, 149a, 150a). This Court in **Pickering** noted that it was not discussing "the kind of close-working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning". 391 U.S. at 570. This Court emphasized that in that case "the statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work . . ." 391 U.S. at 569-70. Appellant in the instant case was hired as a teacher's aide. Certainly, her working relationship with the teachers

whom she was supposed to be assisting would be an important factor in her suitability for her job. Even if disagreements with other teachers had been a part of the reason for Mrs. Caldwell's dismissal, her case still would not fit within the factual context of **Pickering.**

Petitioner, Mrs. Caldwell, in her brief in the Court of Appeals and her petition for certiorari to this court relies heavily upon the case of **Stromberg v. California,** 283 U.S. 359 (1931), for the proposition that if any one of the several grounds of dismissal was void, then the decision cannot be constitutionally justified. **Stromberg** was an appeal of a criminal conviction. The defendant was convicted on a general verdict of violating a statute, one part of which was found to be unconstitutional. The Court discussed at length that it was impossible to determine whether or not **Stromberg** was convicted under a constitutional part of the statute. There is considerable question whether the rule in **Stromberg** concerning criminal convictions would apply in this case, but it is clear that even under the **Stromberg** rule, the dismissal of Mrs. Caldwell must stand. Mrs. Caldwell has never shown that any aspect of her dismissal was unconstitutional but even if such is conceded, the fact remains that her undisputed incompetence provides the sufficient independent ground to sustain the dismissal.

II

There Is No Important Question of Federal Law.

As has been discussed at length above, there is no analytical dispute between the parties as to what standards of mootness should be applied by the Federal Appellate Courts. The only real question between the parties as to mootness is as to how their facts fit these standards. The same point is also true of the argument as to whether or not the case properly falls within the class action procedure. There is no dispute as to language of rule 23 or the language or meaning of the cases decided thereunder. The dispute is between the petitioners' view of the case and the respondents' view of the case and therein lies the distinction between whether or not the class action rule would be applied.

The only issue presented by the petition for certiorari which might have any sort of important or national significance is the first of the questions presented in the petition: "whether a black high school student can be dismissed from the school band for refusing to play the song 'Dixie'" (Petition for Certiorari—p. 3). However, this is inappropriate for consideration as a reason for granting the petition for certiorari for two reasons. First, based upon the record, the question is not before the Court. The respondents have denied that this young man was dismissed for refusing to play "Dixie". The trial court after hearing the proof agreed with the respondents and characterized petitioner's claim as "unsupported" (Petitioner's Appendix—p. 25a). Thus, unless this Court is to enter into a rehearing on the facts at this stage, the question of whether a student can be dismissed for refusing to play "Dixie" is not before the Court since according to the record no student has been dismissed for refusing to play the song. The second reason this question should not

lead to a granting of a writ of certiorari is akin to the first. Even if this Court were to reverse the Court of Appeals and decide that the question were not moot, then the case is only back to the same point it was in the Court of Appeals and if the case were returned to the Court of Appeals or to the trial court, there is from this record no reason to believe that the question of whether a student can be forced to play "Dixie" would progress any further than it already has. The trial court made its finding of fact and no reasons have been presented which would lead the Court of Appeals to reverse the facts and determination of the trial court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted

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